IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 342.

PATTIE L. HILLIARD,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for the Writ of Certiorari

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In Opposition to the Petition for the Writ of Certiorari.

The Respondent, State of Tennessee, for its statement in opposition to the Petition for the Writ of Certiorari would respectfully show to the Court as follows:

OPINION BELOW.

The Petitioner, Pattie L. Hilliard, appealed to the Supreme Court of Tennessee from a conviction of fraudulent breach of trust rendered against her in the Criminal Court of Davidson County, Tennessee, and after hearing argument the Supreme Court of Tennessee unanimously affirmed the judgment of the lower court in an unpublished opinion. The opinion of the Supreme Court of the State of Tennessee in this case can be found in the appendixes to the Petition for the Writ of Certiorari.

JURISDICTION.

Jurisdiction is sought under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED.

1. Was the Petitioner denied her constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States when the State's Highest Court, in its opinion, stated by way of introduction that the defendant failed to testify but made no holding with respect to the sufficiency of the evidence based upon such failure to testify where the scope of review before said Court is limited to a determination of the question of whether the evidence preponderates against the guilt of the accused?

2. Was the Petitioner deprived of her constitutional rights under the Fourteenth Amendment to the Constitution of the United States by the Supreme Court of Tennessee in imposing the sentence and penalty greater than that authorized by law where such imposition was a clerical error and was subsequently corrected by order of said Court?

3. Was the Petitioner deprived of her constitutional rights under the Fourteenth Amendment to the Constitution of the United States by being tried and convicted under a statute declared valid by the State's Highest Court but enacted by a Legislature which has not been reapportioned since 1901?

STATEMENT OF THE CASE.

This suit was commenced against the Petitioner in the Criminal Court of Davidson County, Tennessee. The indictment was in two counts. The first charging Petitioner with fraudulent breach of trust, alleging she had been entrusted with the sum of $6,708.21 for the purpose of investing the same in real estate mortgages at a yield of six per cent per annum, which she feloniously converted to her own personal use with the intent to deprive the owner thereof, and secondly, upon a count charging common law larceny upon the same facts.

The Petitioner was put to trial before a judge and jury and was found guilty of fraudulent breach of trust and sentenced to serve a maximum of three years in the State Penitentiary.

The State proved that the Petitioner had induced Miss Christine Baskin, the prosecutrix, to convert her life's savings, which consisted of United States Government Bonds and some shares in a credit union, into cash and turn the same over to her for reinvestment in real estate mortgages at a yield of six per cent per annum. It was further proven by the State that the Petitioner admitted upon several occasions that she had received this money for the sole purpose of investing it for Miss Baskin. In addition to this, the State proved that after the Petitioner had had this money for a considerable period of time and the prosecutrix was pressing her as to the whereabouts of this money, she made an effort to cover her misappropriation of the money by executing a deed of trust upon her own home in which she warranted the property to be unencumbered, but in fact was so heavily encumbered that the deed of trust was worthless. **The Petitioner, in response to this, offered no proof whatsoever, either by herself or otherwise.**

The Petitioner appealed to the Supreme Court of Tennessee and presented several assignments of error, none of which raised any State or Federal constitutional questions, but dealt primarily with the question of whether the evidence preponderated against the verdict of guilty and in favor of her innocence. The Supreme Court of Tennessee in review of this case held that the State had put on an abundance of credible evidence which would warrant a jury in reaching a verdict of guilty and this being especially true in the total absence of any proof to the contrary.

Pursuant to the rules of the Supreme Court of Tennessee, the Petitioner filed a petition to rehear raising two grounds upon which she contends her constitutional rights had been violated. First, it was insisted that the Supreme Court of Tennessee drew an inference of guilt based upon an introductory statement by the Court that she had failed to testify in reaching their decision as to the sufficiency of the facts in violation of her rights protected under the Fourteenth Amendment. The second contention asserts that she was denied due process of law guaranteed under the Fourteenth Amendment since she was convicted under a statute which was unconstitutional because it was re-enacted by a Legislature that had not been reapportioned in accordance with the Constitution of the State of Tennessee.

The Supreme Court denied the petition to rehear and held that the alleged violations of the Federal Constitution were without merit in that the Court did not draw an inference from the Petitioner's failure to testify, but merely related the extent of the proof that was before them for consideration and that the question of reapportionment, as it affects the validity of the laws of this State, had been previously decided.

ARGUMENT.

1. The petition presented in this cause asserts that the Supreme Court of the State of Tennessee affirmed the conviction of the Petitioner upon the grounds that she failed to testify, when, in fact, the said Court made no such holding. The only utterance by the High Court of Tennessee, which deals with the Petitioner's failure to testify, is an introductory statement which reads as follows:

> "Before reciting the material evidence in support of the verdict of the jury it should be stated first that only two witnesses testified with regard to the transaction and the Defendant did not take the stand in her own behalf." (See page 14, Petition for Certiorari.)

This fact was not made the basis of determining any question in regard to the sufficiency of the evidence. The Petitioner was put to trial upon an indictment consisting of two counts. The first charged the Petitioner with fraudulent breach of trust and the second with grand larceny. The jury, after hearing the evidence presented upon the trial, found the Defendant guilty of fraudulent breach of trust only. The Supreme Court of the State of Tennessee, upon review of this trial, found as a fact that the Petitioner had promised to invest the money of the prosecutrix in real estate bonds which would earn six per cent interest, and due to the circumstances surrounding this transaction, the jury was warranted in finding that the arrangement was not a loan but a trust agreement. The conclusions drawn by the High Court of the State of Tennessee were based upon the testimony of the State's witnesses, as is clearly reflected in the following excerpt from its opinion:

"**In view of the testimony to the effect that the defendant stated to Miss Baskin in the presence of Miss Compton and previous thereto that she had promised to invest this money in real estate bonds at 6% interest,** the jury was warranted in finding that she was not guilty of larceny but was guilty of fraudulent breach of trust.

"Then as between guilt or innocence, the jury had to decide whether in view of this documentary evidence the transaction was one of a loan of money to the defendant or was not a loan but was a trust instead." (Emphasis supplied.)

The Supreme Court of Tennessee then proceeded to discuss the inference which the jury could draw from the facts presented:

"It does not seem a difficult stretch of the mind to understand how the jury felt that this was not a simple loan transaction. The defendant is an experienced lawyer apparently, because she had a reputation along certainly this special line of Civil Service matters which caused someone else to recommend her to Miss Baskin and it must be presumed that if she had a license to practice law, she was familiar with the forms of commercial papers such as notes and deeds of trust, whereas there is nothing in the record to show that Miss Baskin was familiar with such—she was simply doing secretarial work in the Veterans' Administration Office without any information in the record as to the particular nature of her work. Then it seems to us that the jury could very consistently feel that there was no reason why Miss Baskin should make a loan of her money to a perfect stranger, whereas she could entrust her attorney with a sum of money upon the thrilling prospect of the latter investing the same in securities that would yield

twice as much income as she had been receiving theretofore particularly on her Government Bonds."

Appellate review of a criminal conviction is not a necessary element of due process and if a State sees fit to grant such review it may place upon the appeal such limitations and conditions as it sees fit. **McKane v. Druston, 153 U. S. 684; Carter v. The People of the State of Illinois, 329 U. S. 173.**

The jurisdiction of the Supreme Court of Tennessee is appellate only as set forth in **Section 16-304, Tennessee Code Annotated**, which reads as follows:

> "The jurisdiction of the court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law upon the present Supreme Court.
>
> The Court has no original jurisdiction, but appeals and writs of error, or other proceedings for the correction of errors, lie from the inferior courts and court of appeals of law and equity, within each division, to the Supreme Court as by this Code provided."

The Supreme Court of Tennessee, in numerous decisions, has dealt with this question of how extensive the review of the evidence is in a criminal case. The Supreme Court of Tennessee in this regard stated in the case of **Foster v. State, 180 Tenn. 164**:

> "The argument on the first assignment of error goes farther than the actual assignment and insists that this court should examine all the evidence introduced, and itself determine that under the evidence, every other reasonable hypothesis is excluded except

the guilt of the defendant. It is so insisted that this court substitute its judgment for that of the jury and the trial court. We feel that this is, in effect, an insistence for a trial *de novo*,' and this the defendant can not have in this court, where the jurisdiction is appellate only" (180 Tenn. 172).

Then again, in the case of **Batey v. State, 191 Tenn. 592,** it commented as follows:

> "One insistence is that the evidence preponderates against the verdict. . . . The burden here is on the plaintiff in error to show that the evidence preponderates against the verdict" (Citing cases).
>
> "Another well established rule must be kept in mind, this is, that the jury has seen and heard all witnesses for both sides and after seeing and hearing them has determined these issues against the plaintiff in error. Their credibility has thus been determined" (Citing cases). (191 Tenn. 596).

In keeping with these precedents of long standing, the State's Highest Court when considering an assignment of error attacking the sufficiency of the evidence does not weigh the evidence upon the scale of reasonable doubt, but views the record as a whole to see if the evidence so preponderates in favor of the innocence of the accused that the minds of reasonable men would not differ. In the instant case when the Supreme Court of Tennessee was called upon to test the sufficiency of the evidence, **the Petitioner offering none in her behalf,** they found only the evidence offered in support of the State's case. It was, therefore, not only necessary, but proper, for the State Court to note that the only proof before them was that which had been presented by the State, and since it was not contradicted, it must be accepted as true there being no objection to its admissibility. This procedure is not

unique to the courts of Tennessee. **Crawley v. United States, 4 Cir., 268 F. 2d 808.**

The Respondent respectfully submits that the claim of a violation of constitutional rights upon this ground is an assertion of law not founded in fact.

WAS THE PETITIONER DEPRIVED OF HER CONSTITUTIONAL RIGHTS BY A CLERICAL ERROR IN THE JUDGMENT OF THE SUPREME COURT OF TENNESSEE ENTERED IN THIS CAUSE WHICH IMPOSED A SENTENCE NOT AUTHORIZED BY LAW, WHERE SUCH CLERICAL ERROR WAS CORRECTED BY A SUBSEQUENT ORDER OF SAID COURT?

This is no longer an open question in this cause. The portion of the judgment initially entered in this cause adjudging the Petitioner to be infamous was a clerical error. The Supreme Court of Tennessee, upon motion of the Respondent, entered an order amending said judgment by deleting therefrom the portion of the judgment objected to by the Petitioner. Said order amending the judgment of the Supreme Court of Tennessee may be found in Appendix A herein. See **Rice v. Sioux City Cemetery, 349 U. S. 70.**

WAS THE PETITIONER DEPRIVED OF CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE THE STATE LEGISLATURE HAS NOT BEEN REAPPORTIONED SINCE 1901?

To prevail under this contention the Petitioner must show that the failure of the Legislature to reapportion itself since 1901 has, in some way, denied her the basic concepts of fair play guaranteed by the due process and equal protection of the laws clauses of the Fourteenth

Amendment to the Constitution of the United States. This Court, in the case of **Leeper et al. v. Texas, 139 U. S. 462,** said in regard to the enactment of State statutes:

> "That whether the statutes of a legislature of a state have been duly enacted in accordance with the requirements of the constitution of such state is not a federal question, and the decision of state courts as to what are the laws of the state is binding upon the courts of the United States." (Citing cases) (139 U. S. 467).

Then with regard to the restrictions that the Fourteenth Amendment to the Constitution of the United States has upon the State administration of their criminal laws, the Court continued as follows:

> "That by the fourteenth amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law. That law in its regular course of administration through courts of justice is due process, and when secured by the law of the state and constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice" (139 U. S. 467, 468).

This position has been reaffirmed by this Court on several occasions. **Geozza v. Tiernan, 148 U. S. 657; Buchalter v. The People of the State of New York, 319 U. S. 427.**

The Supreme Court of the State of Tennessee, in its opinion denying the petition to rehear filed in this cause, overruled the Petitioner's contention that the statute was

invalid upon the grounds herein claimed citing as its authority the case of Kidd v. McCanless, 200 Tenn. 273, appealed dismissed 352 U. S. 920 (See Appendix B, Petition for Certiorari). This ruling by the State Court declared this statute to be a valid act. This act, likewise, in its application reaches all persons within the jurisdiction of the State of Tennessee without any distinction as to any person or particular class of persons. The administration and enforcement of this law is fulfilled through the procedure set forth in the Criminal Code of Tennessee which operates on all persons impartially and is not subject to any arbitrary exercise of power. The statute in question and the administration and enforcement thereof meets all of the requirements of the Fourteenth Amendment to the Constitution of the United States as set forth by this Court in the case of **Leepers et al. v. Texas**, supra, and the mere fact the Legislature, which codified this statute that has been on the books in the State of Tennessee since 1855, has not been reapportioned in sixty years does not raise a substantial federal question for which a writ of certiorari will issue.

CONCLUSION

The petition before the Court in this cause merely alleges that certain constitutional rights have been violated. These allegations, however, are either assertions of law not substantiated in fact, or do not establish a federal question of substance decided in a manner repugnant to the decisions of this Court. The burden here is upon the Petitioner to show that the injustice claimed is a reality and not mere speculation. **Buchalter v. The People of the State of New York**, supra. The Fourteenth Amendment to the Constitution of the United States is a citadel to prevent the encroachment by the states upon individual rights, but it is not now or has it ever been a haven of refuge for the convicted criminal.

It is, therefore, respectfully insisted by the Respondent that the Petitioner's application for a writ of certiorari be denied.

Respectfully submitted,

.....

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

.....

WALKER T. TIPTON,
Assistant Attorney General,
State of Tennessee,
Attorneys for Respondent.

Certificate of Service.

I, George F. McCanless, Attorney General of the State of Tennessee, one of the attorneys for the Respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on the ... day of September, 1961, I served copies of the within brief for the Respondent on Pattie L. Hilliard, Petitioner, by mailing said copies in duly addressed envelopes, postage duly paid, to the counsel of record, namely, R. C. Boyce, Jr., 3333 Trimble Road, Nashville 12, Tennessee, and E. C. Yokley, Nashville Trust Building, Nashville 3, Tennessee.

.....

George F. McCanless,
Attorney General, State of
Tennessee.

APPENDIX A.

In the Supreme Court of Tennessee,
At Nashville.

Pattie L. Hilliard	
vs.	Davidson County Criminal.
State of Tennessee.	

ORDER.

In this cause upon motion of the Defendant in Error and it appearing to the Court that the judgment as heretofore entered on May 5, 1961, affirming the conviction of fraudulent breach of trust in this cause, and adjudging the Defendant to be infamous, is erroneous upon its face in that the judgment of infamy was not a part of the judgment of the trial court and does not, as a matter of law, attach to a conviction of fraudulent breach of trust.

It is, therefore, ordered by the Court, and in accordance with Sections 20-1512 and 20-1513, Tennessee Code Annotated, that the judgment heretofore entered in this cause on May 5, 1961, be amended by striking therefrom the third paragraph which reads as follows:

> "It is further ordered by the Court that the Plaintiff in Error be infamous and disqualified from holding office under this state or electing the elective franchise."

Office of Clerk of the Supreme Court
For the Middle Division of the
State of Tennessee.

I, B. J. Boyd, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the

order of said Court, pronounced at its December term, 1960, in case of Hilliard against State as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the seventh day of September, 1961.

s B. J. Boyd,
Clerk.